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CASE NO. 84-1254

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

* * * * *

LOCAL UNION NO. 2812
LUMBER, PRODUCTION AND INDUSTRIAL WORKERS,

Petitioner,

vs.

MISSOULA WHITE PINE SASH COMPANY,
A Montana Corporation,

Respondent.

* * * * *

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

* * * * *

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * * * *

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I.

QUESTION PRESENTED

Whether under the collective bargaining agreement Respondent was lawfully empowered to discharge 14 employees who were on "layoff" status, where the agreement expressly granted the employer ". . . sole and exclusive right to hire, discipline or discharge any employee . . ." and the discharge was not motivated by a desire to punish protected Union activity.

CERTIFICATE

This is to certify in compliance with Rule 28.1 of the Supreme Court of the United States that Missoula White Pine Sash Company, the Respondent, is a wholly-owned subsidiary of Huttig Sash & Door Co., a Delaware corporation, Chesterfield, Missouri, which is a subsidiary of the Crane Co., an Illinois corporation, of New York, New York

Sherman V. Lohn
Counsel of Record
For Respondent

II.

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IV.

DECISIONS BELOW

Respondent is satisfied with Petitioner's statement of decisions below.

V.

BASIS FOR INVOKING JURISDICTION

Respondent is satisfied with Petitioner's jurisdictional statement.

VI.

STATUTES INVOLVED

This case involves the interpretation of a collective bargaining agreement between the parties and neither federal nor state statutes have direct bearing on the issues.

VII.

STATEMENT OF THE CASE

Respondent is satisfied with Petitioner's version of the case development. Respondent would respectfully submit, however, that the opinions of the courts below speak for themselves and are attached in the Appendix of Petitioner's Brief.

VIII.

SUMMARY OF THE ARGUMENT

The stated issues underlying Petitioner's request for a Writ of Certiorari are limited to the interpretation of a particular collective bargaining agreement and have no national importance. The contract was correctly interpreted by the lower courts. The Petition for

Certiorari should be denied.

IX.

ARGUMENT

A. Introduction

Both the District Court and the Ninth Circuit Court of Appeals examined the "Hire and Discharge" provision in the particular collective bargaining agreement between Missoula White Pine and Sash Company (White Pine) and Local Union No. 2812, Lumber, Production and Industrial Workers (the Union) and, as concluded by the majority in the Opinion of the Ninth Circuit Court of Appeals, the provision "carefully protects White Pine's common law unrestrictive right to discharge" employees for "good cause, bad cause, or no cause at all without violating the

National Labor Relations Act as long as the motivation is not to punish protected Union activity." (A-1 through A-13 attached as Appendix to the Union's Petition for Writ of Certiorari).

The issues raised below concern only the particular agreement between White Pine and the Union and do not rise to a stature necessitating invocation of:

> . . . a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.
>
> Forsyth v. City of Hammond, 166 U.S. 506, 514, 17 S.Ct. 665, 669, 41 L.Ed. 1095, 1098-1099 (1896).

Petitioner's request for a Writ of Certiorari should be denied.

B. No Compelling Reason for Certiorari Exists.

The judicial interpretation of the particularized collective bargaining agreement between these parties hardly rises to the status of one in which "there are 'special and important' reasons for granting the writ of certiorari, as required by Supreme Court Rule 19." Rice v. Sioux City Cemetery, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955); Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935, (1959).

The agreement negotiated by these litigants was entered into on September 23, 1980, after open collective

bargaining, and had a finite term, expiring on September 1, 1983. It contained provisions tailored by the parties for the specific needs of management and labor in the context of the particular employer, Missoula White Pine and Sash Company and the particular laborers, represented by Local Union 2812. It was not a contract with nationwide impact but rather, it served only the short term needs of these parties.

Petitioner argues that the issues posed in this case are of wide import to all collective bargaining agreements and if unresolved will upset "the careful balance of interests embodied in these collective bargaining agreements." (Petition, page 9). While the issues raised may present an opportunity for an

intellectually interesting abstract examination of the bargaining concept, they are precisely the type of academic and episodic issues that have been historically insufficient as a basis for this Court's review. Magnum Import Co. v. Coty, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922, (1922), Rice v. Sioux City Cemetery, supra. Writing for the court in Coty, supra, Mr. Chief Justice Taft stated:

> The jurisdiction to bring up cases by certiorari from the circuit court of appeals was given for two purposes: first, to secure uniformity of decisions between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.
>
> Coty, 262 U.S. at 163, 43 S.Ct. at 532, 67 L.Ed at 924.

In contrast to the intellectual possibilities, the real impact of the instant action is limited to the determination of the intent of these parties in framing this particularized collective bargaining agreement and nothing more.

C. Standard of Review

Assuming arguendo, that the issues raised here are of a "special and important" nature, the review herein would be whether the circuit court was correct in its conclusion that the district court's opinion was not "clearly erroneous".

As can be seen from the lower court opinions and the record in this case, the matter primarily involves interpretation of the contract.

Respondent has always maintained that the contract contains no ambiguity and clearly provides that the right of termination is vested in the employer. Even if the Petitioner had been successful in demonstrating conflicting provisions, the lower court was in the best position to determine the intent of the parties and resolve any ambiguities that may have existed in the contract. As such, this was a factual dispute involving contract interpretation and the intent of the parties was of prime importance in resolving any potential ambiguities.

As noted in the Judgment (Appendix to Petition, page A-28):

> This action came on for trial before the court, United States District Judge Hon. Russell E. Smith presiding. The issues having been duly tried and a decision having been duly ren-

> dered, it is ordered and adjudged that plaintiff is denied all relief and may take nothing by this action and that defendant recover its costs of action.

Incumbent in the lower court's conclusion was the factual determination of the intent of the parties as manifested by the agreement and the additional stipulated facts. As argued to the Ninth Circuit Court of Appeals, Federal Rules of Civil Procedure, Rule 52(a) restricts the review to whether the district court's conclusion about the intent of the parties was "clearly erroneous". Collins v. Thompson, 679 F.2d 168 (9th Cir. 1982); Estate of Van Horne v. Comm'r, 720 F.2d 1114 (9th Cir. 1983); Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982).

The policy reasons for such a review standard are obvious as stated by the Ninth Circuit Court of Appeals in Lundgren v. Freeman, 307 F.2d 104 (9th Cir. 1962):

> . . . it [the rule] should not be construed to encourage appeals that are based upon the hope that the appellate court will second-guess the trial court.
>
> 307 F.2d at 114.

Here Petitioner seeks invocation of this court's extraordinary exercise of certiorari to second guess not only the trial court but the appellate court as well. Such an invocation of this court's review powers ignores judicial economy and abrogates the intent of the Act of March 3, 1891, 26 Stat. 826 (commonly known as

the Evarts or Circuit Courts of Appeal Act). As noted by the legislators at the time of enactment,

> No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal.
>
> Hearings before the Committee on the Judiciary of the House of Representatives on H.R. 10479, 67th Cong., 2d. SESS. 2.

The opinion of Judge Smith was not "clearly erroneous" and moreover was

affirmed on proper appeal to the Ninth Circuit Court of Appeals. The case history of this particular action provides independent justification for denial of the Union's petition for certiorari.

D. The Court of Appeals Neither Failed to Comprehend nor Ignored this Court's Precedent.

Petitioner's citation to Fishgold v. Sullivan Drydock and Repair Corporation, 328 U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946) provides no basis for examining the circuit court's opinion. This is not a case where the circuit court has confused layoff and discharge. In fact, to reach its conclusion, the Circuit Court of Appeals was required to recognize that discharge and layoff are different

concepts, which the parties bargained for separately, and were not necessarily interrelated.

No party or court reviewing the contract in this case has argued that layoff is tantamount to discharge as in Fishgold. The issue raised below was whether the seniority provision precluded a separate act, discharge, under the Hire and Discharge provision of the agreement. Nothing in the documents or evidence of the parties' intent supports the position of Petitioner that the Seniority provision is equated with discharge. The district court in examining the evidence concluded that a laid off employee was subject to discharge if White Pine chose to exercise its right to do so under Section VIII of the agreement. Absent discharge, the

seniority provision would be effective for a laid off employee (specifically the 80 employees laid off by White Pine but not discharged).

Just as this Court examined the legislative history of the Selective Service Act in Fishgold and determined that the Act could have been drafted to provide the protection sought by Abraham Fishgold, so here, the parties could presumably have negotiated a contract with language to provide the Union with the particular protection and interpretation it now seeks. As noted by the majority opinion circuit court here, the fact that the language of the Hire and Discharge provision conveyed the

> . . . "sole and exclusive right to hire, discipline and discharge any employee," indicates to us that the parties did not

> intend to limit the common law right of the employer to discharge at will. Had such been the intention, it could easily have been incorporated into the agreement. * * * It is not for this court to substitute its judgment for that of White Pine as long as White Pine exercised its prerogatives in good faith and in accordance with its contractual obligations. To do otherwise would be to subvert the collective bargaining process by remaking the collective bargaining agreement.
>
> Appendix to Petition for Writ of Certiorari, pages A-12, A-13.

It is disingenuous for the Union to seek this Court's assistance in redrafting an agreement fairly bargained for and which has since expired.

Similarly, the lower courts here have not failed to "afford any weight to the importance of contractual seniority rights" and have not ignored the concept

embodied in Footnote No. 4 of Firefighters v. Stotts, et al., ___ U.S. ___, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1983).

In Stotts this Court was examining whether modification of a decree entered pursuant to claims brought alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., would be of no real concern to the employer-city and the employees if its net result was to eliminate a bargained for seniority system.

The Stotts case is inapplicable here. This action involves the interpretation of a collective bargaining agreement that contains numerous provisions, all presumably important to the bargaining parties. It does not involve interaction of competing public policy

such as Title VII that would result in the wholesale elimination of bargained for provisions to the detriment of both parties. Had the Union or the parties desired to place special emphasis upon the seniority system as now argued by Petitioner, they certainly could have included language to that effect, specifically, language that the seniority system provision was to take precedence over all other provisions of the contract. The parties chose not to include such emphasis, and interpreting the contract to give effect to all provisions does not jeopardize any national public policy with regard to seniority systems.

Finally, Local 2750 Lumber & Sawmill Workers, Etc. v. Cole, No. 980, (D. Ore. 1978), rev. in part, 663 F.2d 983

(1981) was correctly analyzed by both the district court and the circuit court of appeals based upon the particular language of the contract. Clearly, if the Union wanted a good faith requirement for discharge, it had several examples to draw from in framing such a protection and could freely bargain for such protection if it chose to do so. The contract provisions in Cole were different from those in the instant contract, both semantically and in effect.

The Ninth Circuit Court of Appeals has not misapplied or failed to consider any prior case authority from this Court and its ruling is not in general conflict with the other circuits. Certiorari should be denied.

X.

CONCLUSION

Respondent respectfully submits that this is not a proper case for invocation of this Court's power to review by granting the Union's Petition for Writ of Certiorari. Respondent respectfully requests that this Court deny the petition.

DATED this 27th day of February, 1985.

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